Supreme Court, U.S.
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No. 85-56

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN R. CONNOR, Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
U. S. DEPARTMENT OF LABOR and
the BUREAU OF LABOR STATISTICS,

Respondents.

REPLY TO MEMORANDUM OF RESPONDENT IN OPPOSITION

John R. Connor, Pro se
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Millburn, New Jersey
07041

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In the matter of

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MERIT SYSTEMS PROTECTION BOARD,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO MEMORANDUM
OF RESPONDENT IN OPPOSITION

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1. Petitioner herein replies to the Memorandum filed by the Solicitor General on behalf of Respondent U. S. Department of Labor in this matter. Petitioner particularly notes that

Respondent's Memorandum is singularly devoid of any citations to controlling and/or persuasive authority in support of its arguments. Its document consists basically of "commentary" on the constitutional arguments advanced in Petitioner's brief.

2. Contrary to Respondent's assertion that the decision of the Court of Appeals "does not conflict with any decision of this Court or any other court of appeals" (Mem. 2, ¶3), Petitioner restates his arguments that the decision conflicts, inter alia, with the Supreme Court's decision in Vitarelli v. Seaton, 359 U.S. 535 (1959), as well as the several cases cited by Petitioner on the issue of administrative due process.

a. Respondent argues that Petitioner's sole reason for attempting to secure testimony from Paul Little is that Little could "confirm petitioner's claims of retaliation and bias." (Mem. 3, ll. 2-3). (Emphasis added). To the contrary, Petitioner's main argument on this issue has to

do with Petitioner's defense of arbitrariness, in violation of 5 U.S.C. §7703(c)(1) (see: Pet. 25,31) and failure to follow agency leave regulations (FPM Letter 630-29), in violation of 5 U.S.C. &7703(c)(2). (Pet. 33-36).

The record demonstrates conclusively that Little knew all there ever was to know about the GSA car issue at the time it occurred on December 14,15,16th, 1981, as evidenced by his own handwritten notes. (Pet. App. E, 62-63a). In other words, Little's originally-approved Sick Leave entry for December 15, 1981 was made with full knowledge of all the facts and circumstances. The factual predicate with respect to Petitioner's use of the GSA car was completed when Little signed Petitioner's Time and Attendance Report for the Pay Period ending 12/26/81. Testimony from Paul Little, by establishing that his "review" of the "circumstances of [Petitioner's] absence on Tuesday, December 15, 1981" (Pet. App. H, 66a) was based on the identical set of facts and circumstances he possessed

when he initially approved Petitioner's sick leave, would establish an "arbitrary" personnel action, in violation of 5 U.S.C. §7703(c)(1). (Unless Little were to admit that Petitioner's January 6, 1982 invocation of arbitration in the Coleman grievance prompted the January 21, 1982 "review".) Some unexpected development obviously caused the review, which is defined as "[a] reconsideration; second view or examination; revision." Black's Law Dictionary, 5th ed. (1979), at 1186.

References to Paul Little were perpetual throughout the testimony of Frank Hayden (Petitioner's immediate supervisor) at the MSPB hearing on June 21, 1982:

> "Late in the morning I got a a call from Paul Little who informed me..." (T. 69, l. 13)
>
> "...after I had come back from lunch I talked to Paul Little." (T. 70, l. 23)
>
> "...I would say approximately 1:30 when I talked to Paul Little." (T. 71, l. 22)
>
> "I also decided I should call Paul Little * * * I called Paul * * * Paul said..." (T. 74, ll. 11-17)

"...it was my belief that field representatives are to go through Paul Little to get a GSA car." (T. 75, l. 15)

"Around 8:25 a.m. I got a call from Paul Little telling me that..." (T. 77, l. 21)

"I went to call Paul Little. I told him..." (T. 78, l. 22)

"While I was talking to Mr. Little..." (T. 79, l. 5)

"...while I was on the phone to Paul Little..." (T. 79, l. 14)

"...and I got back on the phone to tell Paul Little what was happening." (T. 80, l. 20)

"When I finished with Paul Little..." (T. 81, l. 1)

"I went down to see Irwin Feigenbaum and Paul Little about what had been transpiring." (T. 81, l. 11)

"I believe I called Paul Little to tell him what John's reaction was..." (T. 82, l. 14)

"Irwin Feigenbaum and Paul Little had contacted our labor management people and they said..." (T. 85, l. 12)

"Well, John left and I called Paul Little to tell him what had happened..." (T. 86, l. 23)

Numerous references to Paul Little were also made by Witness Irwin Feigenbaum in his testimony on June 21, 1982 (see: Transcript, pp. 108, 109, 110, 111 and 112). Consequently, with respect to Paul Little, we are talking about a principal

participant in the events of December 14,15,16th-not any bystander. He literally - as well as telephonically - directed his subordinate Frank Hayden during the GSA episode. And as the management official who first approved and then later reversed Petitioner's leave entries for December 14 and 15, 1981, he is also the architect of the critical management decisions that created the administrative basis for Feigenbaum's removal proposal on January 28, 1982. In fact, Little is a "but for" type of witness, which is to say: without the critical AWOL entry of 4 hours on the afternoon of December 15th, Petitioner could not be accused of "insubordination" if he was legitimately on "approved" Sick Leave when he was allegedly required to return the GSA car to the motor pool. Consequently, evidence from Little is necessary "for a full and true disclosure of the facts" in this matter. 5 U.S.C. §556(d).

Respondent further erroneously states that "Petitioner knew well in advance of the hearing that Little would not be available * * * and

could have deposed him before he left * * * but did not attempt to do so." (Mem. 3). The fact of the matter is that Petitioner only learned of Little's impending departure for Latin America on or about June 15, 1982, less than 5 days before his June 20th departure date. There was no opportunity for scheduling a deposition on such short notice[1] however Petitioner immediately moved for a continuance of the MSPB hearing date to July 15, 1982 (see: A 94-127A). The request was denied. The confrontation and cross-examination of Little that Petitioner is seeking is that which occurs at a "full trial-type hearing," K. Davis, Administrative Law Treatise §12:9 at 445 (1979), "...under conditions where his demeanor as a witness can be observed." (A 124A) (emphasis in original).

b. In its Memorandum, Respondent attempts to argue that the Bureau's approval of Petitioner's leave (4 hours Sick Leave on December 15th) was "apparently accidental." (Mem. 4, n. 6). And

---

[1] Little was in Philadelphia; Petitioner was in North Jersey; and Petitioner's attorney was in Baltimore, Md.

even though critical evidence on this issue was most unfortunately omitted from the MSPB hearing, the June 21, 1982 testimony of Irwin Feigenbaum established unequivocally that the initial leave approval was far from being "accidental":

> ...but the initial submission to the secretary was to honor his sick leave, if you will, on the time card. (Emphasis added)

(T. 118, ll. 2-3). Consequently, the conclusion is inescapable: B.L.S. management, in the person of Paul Little, made a conscious, affirmative decision to "approve" Petitioner's Sick Leave Request for 4 hours on December 15, 1981, in accordance with FPM Letter 630-29. And in the absence of fraud or misrepresentation, the initial approval must stand. FPM Letter 630-29. It is well settled in administrative law that "reasonable regulations promulgated pursuant to statutory authority have the force and effect of law." Pearce v. Director, Office of Workers' Compensation, 647 F.2d 716, 726 (C.A. 7, 1981). An agency is bound by its own regulations.

Whelan v. United States, 529 F.2d 1000 (Ct. Cl. 1976). The Supreme Court, moreover, has further found that where an adverse personnel action has been carried out in substantial violation of procedural Regulations, it is nothing less than a void action, and the employee is entitled to recover his pay. Service v. Dulles, 354 U.S. 363 (1957).

. . . . .

Respondent further erroneously states that "...petitioner implied that his sick leave had been approved in advance when it had not." (Mem. n.7). The fact of the matter is that Petitioner has at all times taken the position that he was only required to give "notice" of sick leave to his supervisor (see: Transcript, June 25, 1982, p. 403, ll. 22-23), which position is in accordance with FPM 630, Subch. 4, Sec. 4-2c(2)(a):

> Absence for Examination or Treatment
> (a) NCFLL Bargaining unit employees: Employees are to inform their supervisors of absences for * * * medical examination or treatment in advance if possible. . .

(Agency Exhibit 5, A 35E). Petitioner's argument is that "approval" was lawfully effected when Little signed his Time and Attendance Report containing 4 hours of Sick Leave in the "approved" column for the Pay Period ending December 26, 1981. And Petitioner finally contends that Little's action in changing the Sick Leave to AWOL on January 21, 1982 constituted a failure to follow agency leave regulations, in violation of 5 U.S.C. §7703(c)(2).

3. With respect to the issue of Agency use of two, prior, unreviewed disciplinary actions to enhance the penalty, Respondent erroneously states that "[p]etitioner had the opportunity to dispute the earlier disciplinary actions, but admitted that he did not avail himself of it." (Mem. 6, ll. 1-3). Very much to the contrary, Petitioner's argument makes explicit his contention that the general rule established in Bolling v. Department of the Air Force, MSPB Order N° NY07528090034 (1981) (the employee was given an opportunity to dispute the action by having it reviewed by an authority other than

the one that took the action), cannot lawfully be applied to Petitioner who was a union-covered employee with contractual rights of review for disciplinary actions. (Pet. 37-41). It, of course, cannot be gainsaid that any "opportunity to dispute the action" must be a lawful opportunity. Petitioner maintains that, under Articles 13 and 15 of the N.C.F.L.L. contract, he was entitled to both grieve the 1980 (3-day) suspension as well as arbitrate the 1981 (15-day) suspension, the N.C.F.L.L., itself, having commenced both procedures on Petitioner's behalf. (See: Appellant's Exhibit 9 and Agency Exhibit 2, attached). Even the MSPB Hearing Officer, in commenting on the 15-day suspension, stated:

> "I think you are right when you say there is an alternate route."

T. 55, ll. 12-14.

. . . . .

Respondent's statement that "...it was inappropriate for petitioner to wait until the Board

proceeding to pursue his theory of the bargaining agreement with regard to the earlier disciplinary actions" (Mem. 6) is so obviously in error that one may conclude that the author of the "Memorandum" has not reviewed the voluminous evidence introduced in the record on this issue.

The Government brought in Mr. Robert Hastings, Director of the Office of Labor-Management Relations as its "expert" on the N.C.F.L.L. contract and the Civil Service Reform Act of 1978. (See: June 21, 1982 Transcript, pages 19-37 direct; pages 49-58 cross). Petitioner also testified on the issue. (See: June 25, 1982 Transcript, 309-321 direct). Numerous exhibits were introduced by both sides on the issue. (See: Agency Exhibits 1,2, and 3; Appellant's Exhibits 6,7,8 and 9; plus Joint Exhibit 1). These exhibits establish beyond a doubt that Petitioner had not only vigorously "disputed" both suspensions from their inception but also they provide ample evidence in the record for the Hearing Officer to have decided the critical Question of whether

"Petitioner had correctly utilized negotiated grievance procedures in seeking review of two suspensions which were later used in determining a removal penalty." (Pet. 2). Particularly relevant are Appellant's Exhibit 8, entitled: Changes Made to DLS 752 To Comply With The Civil Service Reform Act of 1978 (CSRA), Office of Personnel Management (OPM) Regulations and Current Department of Labor Regulations and Organization:

> "5-10i(2)(g) Adverse Decisions - This subsection has been revised to provide for an employee's grievance rights in cases of suspensions for 14 days or less. (DLS 771, Article VI, Local 12 Contract, Article 15, NCFLL Contract)."(Emphasis added).

(E 70E), and Agency Exhibit No. 1, a letter dated May 9, 1980 from Regional Commissioner Alvin I. Margulis to Petitioner, which states:

> "...The Department does not agree with your interpretation - Article 13, Section 3 of the agreement states: * * * If the final written decision provided for in Section 2 of this Article involves a suspension of 30 calendar days or less, the matter may be appealed directly to arbitration * * *" (Emphasis added)

(E 5E). The first exhibit confirms Petitioner's

position that he was correct in grieving the 3-day suspension and the second exhibit directly supports his invocation of arbitration for the 15-day suspension.

. . . . . .

The failure of the Agency to correctly inform Petitioner of his dual appellate remedies in its decision letters (A 13A, 18A) violated Petitioner's due process rights under 5 U.S.C. §7121(e)(1) and FPM Chapter 752, Subch. 3-3k(2).

A decision by the MSPB Hearing Officer on the legal issue of whether Petitioner had correctly utilized N.C.F.L.L. negotiated grievance procedures in seeking review of the 1980 and 1981 suspensions was required not only because the issue was relevant to the severity of the penalty imposed but also because the contract issue was a "material" issue of law "presented in the record." 5 U.S.C. §557(c)(3)(A); 5 C.F.R. §1201.111(b)(1). See: K. Davis, Administrative Law Treatise §14.27 at 125.

Had the MSPB decided the contractual issue even erroneously, Petitioner would have been entitled to full judicial review of same because "[d]ecisions of officers of the administrative departments of the Federal government upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers." American School v. McAnnulty, 187 U.S. 94 (1902). An order may not stand if the agency has misconceived the law. Securities & Exch. Commission v. Chenery Corp., 318 U.S. 80 (1943).

In this case, however, we are confronted with the stated refusal of the MSPB Hearing Officer to decide the NCFLL contract issue. The Ninth Circuit has held that the "absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings." Anglo-Canadian Shipping Co. v. Federal Maritime Commission, 310 F.2d 606, 617

(C.A. 9, 1962). Accord: Brotherhood of Maintenance of Way Emp. v. U.S., 221 F.Supp. 19, affirmed 375 U.S. 216 (D. C. Mich. 1963).

The Due Process claims presented in this Petition have been extensively argued by Petitioner since the inception of this matter. (In fact, Petitioner's Petition for Rehearing in the Court of Appeals was devoted exclusively to the issue of "missing" Witness Paul Little.) During this period, Petitioner endured official concern for the rights and privileges of others (Presiding Official Butler: "...he's away on vacation and I hesitate to delay... " T. 408, ll. 23-24) while suffering pointed disregard for his own defenses (Presiding Official Butler: "Setting aside appellant's argument that I interpret the bargaining unit agreement... " Pet. 31a, ll. 24-28), to the extreme prejudice of of those defenses.

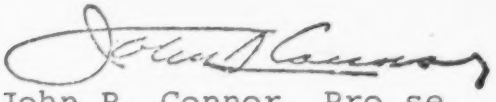
The critical "gaps" in this matter are of such magnitude that they could only properly be

closed by a remand.

CONCLUSION

For the reasons hereinabove stated, in reply, together with those arguments contained in his Petition for Certiorari, Petitioner requests that the Supreme Court issue its Writ of Certiorari in this matter.

Respectfully submitted,



John R. Connor, Pro se

November 11, 1985

(Appellant's Ex. 9)

Mr. I.L. Feigenbaum
A.R.A. B.L.S.
U.S. Department of Labor
3535 Market St.
Phila. Pa. 19104

Re: Connor J.R.

Dear Sir:

Be advised I have been requested to represent the above captioned individual with a possible grievance.

I request a meeting with you in an effort to resolve this issue at the informal (first step). I here by request that you stay all potential action.

Advise me as to a mutually convenient time and place for said meeting.

Sincerely,

/s/ Edward F. Donnelly

February 25, 1980

Edward F. Donnelly
Ex. V.P. Lu 644
22 No. Penna Av
Wilkes Barre, Pa 18702

cc: Connor
file

[Handwritten note]

John
Prior to a (or the) meeting you & I will get together. I'll advise you as soon as I hear from Feig.

Regards,

Ed

71E

(Agency Ex. 2)

327 Delaware Avenue
West Pittston, Pa. 18643
21 April, 1981

Mr. Robert H. Hastings,
Director, Office of Labor-
Management Relations, OASAM
Room S1313
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Re: Request for Arbitration

Dear Mr. Hastings:

In accordance with Art. 13, Sec. 3(B), N.C.F.L.L. Agreement, I herein invoke Art. 16 arbitration in the matter of the 3-week suspension from duty of JOHN R. CONNOR, U. S. Department of Labor, Bureau of Labor Statistics, Philadelphia, Pa., which suspension commenced 20 April, 1981.

Furthermore, in accordance with Art. 15, Sec. 11(A) I request that a "stay" be issued so that JOHN R. CONNOR can return to duty immediately.

Sincerely,

/s/ Edward F. Donnelly

EDWARD F. DONNELLY, Exec.V.P.
N.C.F.L.L., Local No. 644

cc: Mr. Howard Butler, President
NCFLL, AFGE, AFL-CIO, Room 1105, Federal Building, Dover, Delaware

Mr. Al Margulis, Regional Commissioner
U.S. Department of Labor - B. L. S.
P. O. Box 13309
Philadelphia, PA. 19101